(1)

90-697

No.

Supreme Court, U.S.
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OCT 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

KARL C. MERTZ,
Petitioner,

v.

LOUIS SULLIVAN, Secretary of
Health and Human Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Road
Building 12
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioner

QUESTIONS PRESENTED

Did the District Court and the Court of Appeals err in determining that Summary Judgment was proper in this case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were Petitioner, Karl C. Mertz, Plaintiff/Appellant below, and Louis W. Sullivan, Secretary of Health and Human Services, Defendant/Appellee below.

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No.

In the
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OCTOBER TERM, 1990

KARL C. MERTZ,
Petitioner,
v.
LOUIS SULLIVAN, Secretary of
Health and Human Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Karl C. Mertz hereby petitions that a writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 30, 1990 and affirmed on rehearing on July 31, 1990.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 30, 1990 (No. 89-8977). The opinion, which is unreported, is contained in the Appendix at page 1. The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is contained in the Appendix at page 2. The United States Court of Appeals for the Eleventh Circuit denial of petition for rehearing was entered on July 31, 1990 and is contained in the Appendix at page 4.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 30, 1990 affirming summary judgment against petitioner entered by the United States District Court for the Northern District of Georgia on October 5, 1989. Petition for rehearing was filed in the United States Court of Appeals for the Eleventh Circuit and denied on July 31, 1990.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 2000e-16(a) of 42 U.S.C. provides:

Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 USCS Section

102] in executive agencies as defined in section 105 of title 5, [5 USCS Section 105] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 2000e-16(c) of 42 U.S.C. provides:

Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection(a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS Section 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Rule 56(c) of the Federal Rules of Civil Procedure provides:

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

A. Course of the Proceedings in the Courts Below

On March 14, 1988 petitioner Karl C. Mertz filed suit against the Secretary of Health and Human Services alleging that respondent's agents rejected his employment application for discriminatory reasons based on race, sex, religion and national origin and based on retaliation for his aggressive support of the rights of women and minorities in his complaints about his employer's violation of equal employment opportunity laws and regulations. District Court Record 1-1, 2.

Respondent filed a motion for summary judgment contending that there were no genuine disputes as to any material facts and that respondent was entitled to judgment as a matter of law. R1-12. Said motion was granted by the District Court. R1-22-2. The District Court entered judgment for respondent on October 5, 1989 (R1-23), and petitioner filed a Notice of Appeal from such judgment on November 30, 1989. R1-24.

The United States Court of Appeals for the Eleventh Circuit entered

judgment affirming the judgment of the United States District Court on May 30, 1990. Appendix, page 1. Petition for Rehearing was filed in the United States Court of Appeals for the Eleventh Circuit and denied on July 31, 1990. App. p. .

B. Statement of Facts

Petitioner Karl C. Mertz is a white male Methodist of German descent. R1-19-1. He holds a doctorate in the field of race relations and affirmative action. R1-17-1. He was an unsuccessful applicant for the position of Equal Employment Manager at the Centers for Disease Control, a part of the Department of Health and Human Services. R1-12-4. When he applied for such position, he was serving as Equal Employment Manager at Ft. McPherson, GA, serving over 5,000 employees, including the headquarters of the United States Army Forces Command. R1-17-1.

At the time of Dr. Mertz' application for the Equal Employment Manager position at CDC, the position had never been held by a white male. At that time all full time permanent employees of CDC's Equal Employment Office were non-white and all except one, a female, of such past employees had been non-white. R1-17-2.

Dr. Mertz was one of six applicants determined by the CDC Personnel Office to meet the basic requirements for the job. R1-19-2. A rating panel then ranked the six candidates and gave Dr. Mertz the highest overall score of any of the six. R1-19-2.

The selecting official, CDC Director Dr. James O. Mason, constituted a panel to assist him in interviewing the candidates and in making a selection. R1-12-8. Dr. Mason and the panel interviewed the three internal candidates in early August 1984 and interviewed Dr. Mertz in mid-August 1984. R1-12-8, 9. The interviewing panels were not totally the same for both sessions but had four common members, including Dr. Mason. R1-12-9.

During the interview, Dr. Mertz stated that he would not stand silently by and allow managers to disregard equal employment opportunity rules and procedures. He also described his conflicts with management officials at Ft. McPherson over affirmative action. R1-19-3, 4. He discussed wine and cheese parties which he hosted at Ft. McPherson to promote racial harmony. R1-19-3. At the mention of wine and

cheese, some panel members, including Dr. Mason, frowned and looked shocked. Rl-17-6. Dr. Mertz felt that Dr. Mason's reaction was unfavorable because of Dr. Mason's Mormon faith, which is against drinking any kind of alcoholic beverage. Rl-17-6. The panel, including Dr. Mason, reacted similarly to Dr. Mertz' discussion of his being sensitized to prejudice at an early age by being treated differently by a Jewish person because of his German ancestry and his difficulty with the United Methodist Church over his racial views as a Methodist minister. Rl-17-7.

In the District Court, panel members stated by affidavit that they felt that Dr. Mertz's answers to interview questions were rambling, tangential and longer than necessary. Rl-12-10. No such reservations were expressed to Dr. Mertz at the interview. Rl-17-2. Some of the panels' questions were open ended, such as the first question to the effect of tell us about yourself. Rl-17-2.

Panel members stated by affidavit that they doubted Dr. Mertz had the interpersonal skills, particularly listening and counseling skills, necessary to be effective in the job. Rl-12-10.

Panel members stated by affidavit that Dr. Mertz showed little concern in finding out more about CDC's goals and problems in equal employment opportunity. Rl-12-10. Dr. Mertz stated by affidavit that he did show such interest and that he asked numerous questions about CDC's equal employment opportunity program, including what they perceived to be their problem areas, what other field offices they had, where most of their under-representation existed and if they had an EEO Council. Rl-17-6.

Panel members expressed the feeling that Dr. Mertz assumed, incorrectly, that the job he was doing at Ft. McPherson was the job to be done at CDC. Rl-12-10. One panel member said that, although Dr. Mertz may have been successful in a "structured environment such as the military," he would be ineffective in a scientific and professional atmosphere. Rl-12-11. Dr. Mertz stated that he said nothing at the interview to indicate that he thought the job he was doing at Ft. McPherson was the job to be done at CDC. There are and were a large number of civilian employees, including professionals, at Ft. McPherson. Since being rejected for the CDC position, Dr. Mertz assumed in May 1987 a GM-13 Equal Employment Opportunity Manager's position with the Agricultural Research Service, handling

an EEO program for over 2,000 federal employees, half of whom are scientists or technicians. His first complete annual performance appraisal in that job was superior. He also received a merit pay bonus. R1-17-10.

Panel members felt that Dr. Mertz seemed to view responsibility for equal employment opportunity to be centralized, resting primarily with the EEO office, a position counter to CDC's philosophy that the ultimate responsibility for equal opportunity and nondiscrimination rests with the CDC director and managers and supervisors throughout the CDC. R1-12-11. Dr. Mertz stated that such a characterization of his view is incorrect, that he also believes that the ultimate responsibility for equal opportunity and nondiscrimination rests with the CDC director and managers and supervisors throughout CDC and that he stated this position very clearly at the interview. R1-17-6.

All panel members interviewing Dr. Mertz stated to Dr. Mason that Dr. Mertz did not warrant further consideration. R1-12-12.

The announcement for the position in question required that the candidates meet the basic qualifications outlined in Office of Personnel Management Handbook X-118. These standards require that persons qualifying for jobs in the GS-260 series at Grade 12 or above demonstrate

> 1. Broad and detailed knowledge of EEO principles, practices, law, regulations and methods;
>
> 2. Knowledge of personnel policies and practices;
>
> 3. Skill in analyzing organizational policies and practices to identify barriers to equal employment opportunity and to propose solutions to equal employment opportunity problems.
>
> 4. Knowledge of the particular employment problems faced by women and minorities, the handicapped, veterans, workers over age 40 or other relevant classes of persons;
>
> 5. Program management skills.
> R1-17-12.

Dr. Mertz stated that he is familiar with OPM Handbook X-118, with the selectee's application and with the interview panel's notes on her interview. With regard to the selectee's qualifications under the first standard set out above, Dr. Mertz stated that the selectee had

never been assigned supervisory duties, that she had no actual experience in dealing with EEO complaints, that she had never worked as an EEO specialist, that she had never developed an overall EEO program, that she did not have supervisory experience in the EEO field and that she did not have experience dealing with post-hiring EEO problems. Rl-17-12. Half or more of EEO problems arise in the post-hiring area. R1-17-13.

With regard to the second standard, Dr. Mertz stated that the selectee had specialization in a limited area of personnel, staffing, and that she had no daily involvement with personnel principles as they relate to equal employment opportunity matters. Rl-17-14.

With regard to the third standard, Dr. Mertz stated that the selectee's skills do not relate to an entire equal employment opportunity program but rather almost exclusively to staffing matters. OPM Handbook X-118 states that one may demonstrate the skills set out in the third standard through experience conducting problem oriented organizational or management analysis studies, by developing detailed EEO affirmative action plans or by similar work. The selectee has not engaged in any of these. Rl-17-14, 15.

Concerning the fourth factor, Dr. Mertz stated that the selectee has not had exposure to managers and supervisors in hostile situations, as many equal employment opportunity complaint situations are, and has not had formal training in the underlying psychological, social, economic and historical reasons for the attitudes some managers and supervisors have toward women, minorities and handicapped persons. Dr. Mertz went on to state that such exposure and training was necessary to dealing with employment problems with members of the protected groups. Rl-17-15.

Concerning the fifth factor, Dr. Mertz stated that the selectee did not have a graduate degree in management, did not have any experience or training in developing, planning, directing and evaluating broad equal employment opportunity programs covering varied subordinate organizations with multiple layers or in meeting program objectives by coordinating resources controlled by other managers. Rl-17-15, 16.

After having been rejected for the position in question, Dr. Mertz filed a timely administrative complaint, which resulted in a decision adverse to Dr. Mertz. Rl-12-14.

After summary judgment was entered by the District Court, the Court of Appeals issued a per curiam affirmance of the District Court decision. App. page 1. Thereafter the Court of Appeals denied petitioner's petition for rehearing. App. page 4 .

C. Existence of Jurisdiction in the Courts Below

Petitioner's claim in the United States District Court for the Northern District of Georgia was based on Title VII of the Civil Rights Act, specifically 42 USC 2000e-16(c). District Court jurisdiction was invoked under 42 USC 2000e-5. The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 28 USC 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT SUMMARY JUDGMENT WAS PROPER IN THIS CASE.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. Respondent recognizes that the courts are much less reluctant to grant summary judgment than has been the case in the past. Yet the standard is still that there is no genuine issue of material fact. Here such issues exist.

The District Court found that Dr. Mertz made a prima facie case. R1-19-9. The respondent's articulated reason for not selecting him for the position was his alleged poor performance at the interview. R1-19-10. Petitioner urges that this reason is unworthy of belief, not only because of the tremendous disparity in the qualifications of petitioner and the selectee but because of the fact that the selectee is objectively unqualified to have been referred for a position.

There are few factual reasons given by respondent for the determination that Dr. Mertz did not do well at the interview. There were only three facts articulated by respondent on this issue. First Dr. Mertz allegedly showed little concern in finding out more about CDC's goals and problems in Equal Employment Opportunity. R1-12-10. Dr. Mertz stated that he did show such concern and that he asked numerous questions at the interview about CDC's Equal Employment Opportunity program, including specifically what the panel members perceived to be the problem areas, what other field offices they had, where most of the underrepresentation existed and if they had an EEO council. R1-17-6.

Second, panel members felt that Dr. Mertz seemed to view responsibility for Equal Employment Opportunity to be centralized, resting primarily with the EEO Office, a position counter to CDC's philosophy that the ultimate responsibility for equal opportunity and non-

discrimination rests with the CDC director and managers and supervisors throughout CDC. R1-12-11. Dr. Mertz stated that such a characterization was incorrect, that he also believes that the ultimate responsibility for equal opportunity and nondiscrimination rests with the CDC director and managers and supervisors throughout CDC and that he stated this position very clearly at the interview. R1-17-6.

Third, and this is probably a mixed statement of fact and opinion, respondent states that Dr. Mertz' work at Fort McPherson was in a structured military environment and therefore Dr. Mertz would be ineffective in a scientific and professional atmosphere. R1-12-11. Dr. Mertz stated that there were a large number of civilian employees, including professionals, at Fort McPherson. Further, after being rejected for the CDC position, Dr. Mertz in May 1987 assumed a GM-13 Equal Employment manager position with the Agricultural Research Service, handling an Equal Employment Opportunity program for over 2,000 federal employees, half of whom are scientists or technicians. He has received a superior performance rating and a merit pay bonus since beginning work with the Agricultural Research Service, R1-17-10.

Aside from these factual allegations, on which there exists a clear dispute, the entire basis for the rejection of Dr. Mertz is admittedly based on feelings, beliefs and impressions; that is, the subjective feelings of panel members developed at the interview. In view of the objective evidence concerning the qualifications of Dr. Mertz and those of the selectee, such subjective reasons are at least questionable. The only way to resolve such question is by the finder of fact listening to the testimony of Dr. Mertz and the panel members as to what went on during the interview and rendering a decision as to whose version is correct. Such a determination cannot be made by evaluating the veracity of opposing affidavits. We believe that the Trial Court did exactly that. In fact, that Court's decision stated that "Plaintiff has given this Court no reason to doubt the credibility of the detailed accounts of his interview provided in the Mason, Hilyer, Watson, Porter, and Essien affidavits." R1-22-2. This turns upside down the burdens of a Summary Judgment proceeding. The approach should not be to credit the evidence of the movant unless the plaintiff overcomes it but rather to believe the evidence of the non-movant and to draw all

justifiable inferences in his favor. *Anderson vs. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

Outside the context of the panel's opinions, there is another genuine issue of material fact, the qualifications of the selectee for referral. Petitioner is not merely arguing that he is better qualified than the selectee. He is arguing that, based on CDC's objective criteria, the selectee is not qualified for the job in question. R1-17-12, 14, 15, 16. This is a vigorously disputed issue essential to the determination of whether respondent's proffered reason for Dr. Mertz's rejection is worthy of belief.

The District Court found that the fact of the selectee's qualification or lack of qualification is irrelevant. R1-19-12. We respectfully disagree. Selection based on interview is by its very nature subjective. For respondent to select a person less qualified, based on objective criteria, than Dr. Mertz casts doubt on the reason advanced and the motive for such decision. For respondent to select a person unqualified even for referral casts significantly more doubt on the credibility of the proffered reason.

Adding to that the fact that no white male had ever held the position sought by Dr. Mertz, that there were no white males in the entire CDC Equal Employment Office and that Dr. Mertz had made clear that he had been and would be an aggressive Equal Employment Manager makes the proffered reason wholly incredible.

As shown in the Statement of Facts herein, Dr. Mertz, an experienced Equal Employment Manager, is familiar with and has reviewed the qualification standards set out by the Office of Personnel Management and adopted by CDC in evaluating candidates for the position in question. A review of those standards and Dr. Mertz' analysis of the selectee's qualifications with respect to the standards shows that her very referral, much less selection, was not appropriate.

The qualifications for the position begin with a requirement that the selectee have broad and detailed knowledge of EEO principles and practices. R1-17-12. Ms. Brewington has never been an EEO specialist and has had no experience in dealing with EEO complaints, in supervising employees, in dealing with post-hiring EEO issues, in reviewing investigative files and in developing EEO programs. R1-17-12.

The second qualifying factor for the position is knowledge of per-

sonnel policies and practices. RI-17-12. The selectee's qualifications in this area are obviously more extensive than her qualifications in other areas; however, even here her experience has been in one limited area of personnel, staffing. She has had no daily involvment with personnel principles as they relate to EEO matters. RI-17-14.

Similarly, her skills in analyzing organizational policies and practices to identify barriers to equal employment opportunity and to propose solutions to equal employment opportunity problems relate primarily to staffing matters. She has not had the experience described by OPM as being appropriate to demonstrate this skill. RI-17-14, 15.

The fourth factor involved is knowledge of the particular employment problems faced by members of the various protected groups. The selectee has had little education or experience in this area and has not had the exposure and training necessary to deal with employment problems of members of the protected groups. RI-17-15.

The fifth factor is program management skills. RI-17-12. The selectee had no experience or training in the qualifying areas described by OPM as developing, planning, directing and evaluating broad EEO programs covering varied subordinate organizations with multiple layers or in meeting program objectives by coordinating resources controlled by other supervisors. RI-17-15, 16.

An interpretation of the facts and inferences in favor of Dr. Mertz, the required treatment on summary judgment evaluation, leads to the conclusion that Dr. Mertz has shown the government's proffered reason for his rejection is not worthy of credence. *United States Postal Service Board of Governors vs. Atkins*, 460 U.S. 711 (1983); *Texas Department of Community Affairs vs. Burdine*, 450 U.S. 248 (1981). Certainly at the very least there is a genuine issue of material fact as to whether Dr. Mertz has shown such, an issue which should be determined by trial rather than by summary judgment. See *Rossy v. Roche Products*, 880 F.2d 621 (1st Cir. 1989).

As the United States Court of Appeals for the Sixth Circuit has said:

> "...If no reasonable person could construe the evidence and its inferences other than in a single fashion, it is appropriate to render judgment if the application of the law to those facts leads to but a single result." *Ott vs. Midland-Ross Corp.*, 600 F.2d 24, 28, fn. 3 (6th Cir. 1979).

The theme of summary judgment being appropriate only if consideration of the case would lead to but one reasonable result has been voiced by the Supreme Court of the United States. This Court has said that summary judgment is appropriate if "there can be but one reasonable conclusion as to the verdict." *Anderson vs. Liberty Lobby, Inc., supra.* at 2511. Conversely, summary judgment is not appropriate "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Supra*, at 2510. Here reasonable minds can differ as to whether Dr. Mertz or the respondent should prevail.

We are dealing here with a Title VII case. Although summary judgment can be utilized in such cases, it is seldom appropriate. *Holland v. Jefferson National Life Insurance Company*, 883 F.2d, 307 (7th Cir. 1989). As one court has said, "We must, however, approach the question of summary judgment with 'special caution' in discrimination cases." *Holland, supra*, at 1313.

We must not forget in cases of this type that Title VII is a remedial statute which should be interpreted liberally. *Bethel vs. Jefferson*, 589 F.2d 631 (D.C. Cir. 1978). There is not a hint of liberal interpretation in a case where summary judgment is granted because a defendant's beliefs and impressions are accepted as fact and the plaintiff's beliefs and impressions are not.

It is obvious that the use of summary judgment has increased in recent years. Yet there has been no change in the Federal Rules of Civil Procedure with regard to summary judgment. Indeed there has been little change in this court's pronouncements on the standards for summary judgment. The heart of the matter still is that summary judgment is appropriate only if consideration of the case would lead to but one reasonable result. *Anderson v. Liberty Lobby, Inc., supra.* That cannot be said about the instant case, and summary judgment is therefore inappropriate.

CONCLUSION

For the foregoing reasons, it is urged that the lower courts' decisions that the Petitioner's case should be decided by summary judgment are contrary to the proper interpretation of this Court's decisions, and therefore it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Road
Building 12
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8977
Non-Argument Calendar

D.C. Docket No. 88-Cv-524

KARL C. MERTZ,

Plaintiff-Appellant,

versus

LOUIS W. SULLIVAN,
Secretary of Health and
Human Services,

Defendant -Appellee

Appeal from the United States District Court
for the Northern District of Georgia

(May 30, 1990)

Before FAY, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Karl C. Mertz,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION FILE NO.
	:	1:88-CV-524-JTC
	:	
Otis R. Bowen, Secretary, Health and Human Services,	:	
	:	
Defendant	:	

ORDER

This Title VII action has been submitted to the Court on the Magistrate's Report and Recommendation. Plaintiff has filed objections. This Court has performed a careful, *de novo* review of the record and for the reasons detailed below, adopts the Magistrate's holding. Defendant's Motion for Summary Judgment is hereby GRANTED. The Court adopts the statement of facts as set forth in the Magistrate's Report and Recommendation but wishes to address plaintiff's objections specifically.

Plaintiff, a white male Methodist of German descent, was an unsuccessful applicant for the positon of Equal Employment Manager ("EEO Manager") at the Centers for Disease Control ("CDC"). The Magistrate granted defendant's motion for Summary Judgment, finding that plaintiff failed to produce evidence that the legitimate reason offered by defendant was a pretext for discrimination, as is required by the third prong of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973).

The CDC produced evidence that all of the people who interviewed plaintiff for the position agreed that he had performed poorly. Mason Aff. ¶¶ 10-12; Hillyer Aff. ¶¶ 4-8; Watson Aff. ¶¶ 3-5; Porter Aff. ¶¶ 3-4; Essien Aff. ¶¶ 3-6. A plaintiff may prove that defendant's

reasons were pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the emplyer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Plaintiff argues that he has carried his burden in this case by showing that the CDC's explanation is incredible. This Court disagrees.

Plaintiff has given this Court no reason to doubt the credibility of the detailed accounts of his interview provided in the Mason, Hilyer, Watson, Porter, and Essien affidavits. Plaintiff must do more than just assert that defendant should not believed. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987) (Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination when employer has produced evidence of legitimate, non-discriminatory reasons for its actions.); *Young v. General Foods Corp.*, 840 F.2d 824, 830 (11th Cir. 1988).

Conclusion

Therefore, for the reasons discussed above, the Court adopts the Magistrate's holding. Defendant's Motion for Summary Judgment is hereby GRANTED.

SO ORDERED, this 3 day of October, 1989.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8977

KARL C. MERTZ,

Plaintiff-Appellant,

versus

LOUIS W. SULLIVAN,
Secretary of Health
and Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING

(July 31, 1990)

BEFORE: FAY, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Karl C. Mertz, is denied.

ENTERED FOR THE COURT:

Peter T. Fay
United States Circuit Judge